

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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RIZWAN RAJA, : 19-CV-1328 (AMD)
Plaintiff, :
-against- : United States Courthouse
JOHN W. BURNS AND THE CITY : Brooklyn, New York
OF NEW YORK, :
Defendants. : Thursday, March 7, 2019
: 2:00 p.m.
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TRANSCRIPT OF CIVIL CAUSE FOR
PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE PAM K. CHEN,
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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1 (In open court.)

2 THE COURTROOM DEPUTY: Civil cause for preliminary
3 injunction hearing, Docket Number 19-CV-1328, Raja versus
4 Burns, et al.

5 Would the parties please state their appearances
6 for the record.

7 MR. ACKMAN: Daniel Ackman for the plaintiff,
8 Your Honor.

9 THE COURT: Good afternoon.

10 MR. ACKMAN: Good afternoon, Judge.

11 MS. STITELMAN: Emily Stitelman for the Office of
12 the Corporation Counsel for the defendant.

13 THE COURT: Good afternoon.

14 MS. STITELMAN: Good afternoon.

15 THE COURT: So I am presiding for the moment over
16 this matter, which is actually assigned to Judge Donnelly,
17 who is in trial because I am on miscellaneous duty today.
18 So that is how I ended up with this case. I have received
19 and reviewed the plaintiff's submission which was filed
20 earlier today.

21 I assume you got half of it, Ms. Stitelman; is
22 that right.

23 MS. STITELMAN: That's right, Your Honor, we have.

24 THE COURT: All right. And I realize, of course,
25 you have not had any time to respond in writing but

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1 hopefully you had the chance to gather your thoughts on
2 this.

3 I'm happy to hear first from the defense on this,
4 although I want to give you my preliminary thoughts on it.

5 Having reviewed the submission as well as what I
6 consider at least the most relevant case law, I think
7 Mr. Ackman, you're going to have a difficult time convincing
8 me that the temporary restraining order is appropriate in
9 this case. The plaintiff is alleging, in essence, a due
10 process violation based on the absence of a hearing pre his
11 impending suspension, which I gather will take effect
12 tomorrow, from being a registered representative to appear
13 on TLC matters before OATH, O-A-T-H, all capitals, all
14 capital letters; which isn't a license, but Plaintiff has
15 argued it is akin to a license. It was certainly a
16 privilege that is granted to individuals who apply and
17 qualify to represent in a quasi legal lawyeristic fashion,
18 TLC drivers who are appearing before OATH on all kinds of
19 charges and violations.

20 The quick factual history, as I understand it, is
21 that back in February of 2018, the plaintiff received a
22 letter from John W. Burns, an ALJ, actually the supervising
23 ALJ and a first deputy commissioner for OATH advising
24 Mr. Raja that he was going to be suspended from acting as a
25 nonattorney representative before OATH based on certain

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1 alleged misconduct which is set forth in a letter. And
2 Mr. Raja was advised that the suspension would take place
3 beginning on March 8, 2019, which is today, actually -- oh
4 tomorrow. I'm sorry, tomorrow.

5 Mr. Raja was also advised that if he wanted to
6 refute these findings of misconduct, that he had to submit a
7 written response to ALJ Burns by March 22, 2019. And also
8 was advised that he should attach any evidence pertinent to
9 that resignation or the charges along with his written
10 submission.

11 Lastly, Mr. Raja was informed that if he failed to
12 respond by that date, ALJ Burns would render a final
13 determination in the matter and would then bar or then
14 Mr. Raja would be barred or banned from appearing at OATH,
15 except as a respondent.

16 The reason I say, Mr. Ackman, I think you have a
17 difficult case to argue for a TRO is that the question of
18 due process requirement in situations comparable to this, in
19 fact, many of them involving actual taxicab drivers, some of
20 the case law you cited to in your submission does set forth
21 a three-part test under *Matthew*, this is a Supreme Court
22 case in terms of deciding whether or not there actually is a
23 due-process violation.

24 And with respect to those three factors, the first
25 one being the interest or the property at interest at stake.

1 The second one -- let's see, let me pull it out of the
2 report. The second one being the Government's interest,
3 both in terms of the action it takes as well as the
4 additional burden of providing more process, and then the
5 public interest in some general sense.

6 It seems to me, just as we found in a number of
7 cases that I have looked at, that while the first factor
8 certainly weighs in Mr. Raja's favor because certainly his
9 livelihood is at risk. The second two factors do not favor
10 a finding of the due-process violation. And it is factually
11 pending because here -- if nothing else -- let me put it
12 this way, I think the remedy he seeks, namely, to stop this
13 action is premature at best, because there is here a
14 structured process. He did receive notice of the charges,
15 and opportunity to respond in writing. It is unclear
16 whether or not he is going to get a hearing after he files
17 his responses. But there is clearly as well, at least to my
18 understanding, the potential for an Article 78 proceeding if
19 he is dissatisfied with whatever happens before OATH.

20 So in this situation the question becomes whether
21 or not the Government has sufficient interest in promptly
22 suspending him and not adding an additional step of a
23 hearing before suspension, whereas here, he has the
24 potential to get a hearing within roughly three weeks of the
25 initiation of the process and the first notice that he gets.

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1 And also a post-depravation remedy to an Article 78 if, in
2 fact, he is terminated from his registered representative
3 status. So I apologize. I am actually searching to make
4 sure I cited *Matthew* criteria correctly. That is what I am
5 looking for at the moment. Yes.

6 Okay. So the three factors are private interest,
7 risk of erroneous depravation, and the Government's
8 interest. So I misstated it earlier. The Government's
9 interest does incorporate, of course, the public's interest
10 in carrying out whatever action it is. Here it would be the
11 suspension of someone that OATH has decided should not
12 represent individuals before them, as well as the burden
13 that would come with introducing a pre-suspension hearing.

14 And then the second factor, which I did not
15 address before, is the risk of erroneous depravation. So
16 here the risk of erroneous depravation is mitigated to an
17 extent by the fact that there is a prompt potential hearing
18 or at least an opportunity for Mr. Raja to contest the
19 allegations that have been made against him. And, of
20 course, in his submission before this Court, he claims that
21 all of the allegations are false. And he will have an
22 opportunity to raise his objections and oppose those
23 allegations or claims or accusations with his own statement
24 and evidence. So by way of a longish preamble, that is how
25 I view this matter at the moment.

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1 Let me hear from the City if they would like to
2 add anything further. And then, of course, I will hear from
3 Plaintiff.

4 MS. STITELMAN: Thank you, Your Honor. I don't
5 have much to add to your statement.

6 You know, recognizing that due process is provided
7 here both in the opportunity to be heard that Plaintiff has
8 at OATH before a final determination is made and then by way
9 of an Article 78 proceeding.

10 And I do just want to add the vulnerable
11 population that Plaintiff served as a nonattorney
12 representative. These are people who are in what they view
13 is a courtroom, an administrative tribunal and they feel
14 they cannot represent their interest and they're looking for
15 someone to do it for them. So having someone with
16 allegations of misrepresentation, fraud to this vulnerable
17 population is really a concern for the City, Your Honor.

18 THE COURT: Okay. So you are sort of reinforcing
19 the notion that the City has a very significant interest in
20 the integrity of that OATH process and the integrity
21 relatedly of the representative who will be speaking on
22 behave of the TLC, in this case, drivers?

23 MS. STITELMAN: That is correct, Your Honor.

24 THE COURT: Okay. And let me also mention before
25 I turn to the plaintiff --

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1 And you can have a seat.

2 -- that some of the case law that I looked at
3 included the following: The case of -- and I will spell
4 this -- *Nnebe, N-N-E-B-E, versus Daus, D-A-U-S, 644 F.3d*
5 *147*, Second Circuit case from 2011 -- I'm sorry, yes; which
6 was cited by Plaintiff in their request for a TR0. The case
7 of *Schneider, S-C-H-N-E-I-D-E-R, PE versus Chandler, PE*
8 which is a district court case by Judge Cote in the
9 Southern District, C-O-T-E, reported at 2018 *Westlaw* 770395.

10 The case of *Rothenberg, R-O-T-H-E-N-B-E-R-G*, again
11 *versus Daus, D-A-U-S*, because that person happens to be or
12 was at the time the head of the Taxis Limousine Commission.
13 *481 F -- Federal Appendix 667, Second Circuit* case from
14 2012. And in that case they actually cite and rely on *Nnebe*
15 and address some of the same issues relating to due process
16 claims, amongst other claims, brought by TLC driver relating
17 to suspension or termination due to failed drug tests or
18 convictions, criminal convictions.

19 Lastly, I looked at *Locurto, spelled L-O-C-U-R-T-O*
20 *versus Safir*, as in Howard Safir, the former police
21 commissioner, *S-A-F-I-R, 254 F.3d 154*, which is a
22 Second Circuit Case from 2001. It's worth noting that the
23 *Locurto* case that the issue had to do with termination of
24 the employee -- to the employee. Obviously, arguably more
25 dramatic sanction or action, I guess, by the City. And in

1 that case, the Circuit found that the availability of
2 post-deprivation proceedings was a factor to be taken into
3 account in deciding whether or not the overall process that
4 was accorded to these employees violated due process. And
5 there in *Locurto* there's similarly a complaint that there
6 was no hearing pre-termination. So I think that case which
7 focused on the availability of Article 78 as being relevant
8 to finding no due-process violation is something that, I
9 think, makes it difficult for the plaintiff to, at least at
10 this stage, prevail on a motion for a TR0.

11 Okay. So, Mr. Ackman, I will hear from you now.

12 MR. ACKMAN: Yes. Your Honor has went over a
13 bunch of topics, and I want to say, respectfully, I think
14 even after the correction, Your Honor got *Matthews* wrong.
15 First of all before you even get -- *Matthews* is a question
16 of mainly whether you have an exception to the general rule.
17 The general rule is that there should be a hearing before a
18 deprivation, some kind of hearing, even though it's a
19 short-term deprivation in this case, potentially. We don't
20 know how long the suspension will last. But even there,
21 there should be some kind of hearing and there's no reason
22 to go against the general rule in this case.

23 As to the *Matthew* factors, Your Honor missed, I
24 think, the most important one but then went back to it, the
25 second factor. The first factor clearly favors the

1 plaintiff. The second factor also favors the plaintiff,
2 that's the risk of error, because that is -- the full
3 purpose of some kind of hearing is to minimize error and
4 make not just abstract theories, but to minimize error.
5 We've laid out -- the reason we laid out why the charges
6 against Mr. Raja are so weak is because there's a strong
7 likelihood of error. When you go straight to a suspension
8 without even talking to the victims of suspension, without
9 getting even -- having some kind of interview even with
10 getting his side of the story.

11 Now, one of the charges, for example, is just
12 self-evidently wrong that they didn't register. We have his
13 registration document.

14 Another of the charges they provide no evidence at
15 all for and is that they provided a false statement to the
16 tribunal. No evidence whatsoever.

17 A third charge that he muttered a profane comment
18 under his breath doesn't apply at all because it wasn't in a
19 proceedings, didn't disrupt the proceeding, didn't even
20 disrupt the clerk's action.

21 So three of the charges before you even get to
22 whether the factual -- if there's any factual basis for the
23 other three, which we, of course, dispute are just
24 self-evidently wrong. So there's obviously a lot of error
25 at work here. And the whole point of a hearing is to

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1 minimize that chance of error, and that's why the general
2 rule is you have a hearing first.

3 But the other cases you cited I am very familiar
4 with those two. *Nnebe*, they said you didn't need a
5 hearing -- or that case is now on appeal a second time. You
6 didn't need a pre-depravation hearing for a very specific
7 reason, that the driver --

8 THE COURT: Let me say this, a pre-suspension
9 hearing, right?

10 MR. ACKMAN: Pre-depravation, I said.

11 THE COURT: Yes.

12 MR. ACKMAN: Pre-suspension. Same thing.

13 THE COURT: Right. But --

14 MR. ACKMAN: You didn't need it in that case for a
15 very specific reason. The driver had been arrested and a
16 separate, not a judicial officer, but at least a police
17 officer had made a determination there were probable cause
18 that he committed a crime. It wasn't something determined
19 by the TLC, that was a critical factor in allowing no
20 pre-depravation hearing in *Nnebe*. That's not at all
21 existing here. We have nothing from any -- on any neutral
22 source charging Mr. Raja with anything. And actually the
23 charges -- there are from arguably the neutral source having
24 to do with the registration, are clearly wrong.

25 So --

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1 THE COURT: But let me just stop you there. I
2 mean, the exact language, as you know from *Nnebe* is, due
3 process does not require in all cases a hearing before the
4 State interferes with the protected interest so long as some
5 form of hearing is provided before an individual is finally
6 deprived of the property interest.

7 MR. ACKMAN: Right.

8 THE COURT: And I think that that is relevant when
9 I said pre-suspension versus pre-deprivation because right
10 now the process is underway.

11 MR. ACKMAN: Right.

12 THE COURT: So all that has happened so far is he
13 has being suspended from March 8th at least until
14 March 22nd, which is less than two weeks. And you are
15 assuming, but you do not know, that he will not get any
16 hearing before there is a final determination. So I will
17 say to you that the second factor, while it weighs to some
18 sense in his favor based on your argument that there is no
19 basis for any of these six charges, although we have only
20 spoken about three and then there is then this risk of
21 error, should, to some extent, or have to be considered in
22 the broader context of what process he is getting before any
23 final deprivation occurs.

24 MR. ACKMAN: Well, there's already going to be
25 deprivation started tomorrow, so it's not like -- we're not

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1 trying to -- I mean, you say this is premature. It's not
2 premature. This thing starts tomorrow.

3 THE COURT: Well, in the due process terms it is.
4 Because we cannot run around all the time in the federal
5 court interfering with a process that exists that will mean
6 for two weeks he might lose his pay --

7 MR. ACKMAN: You can --

8 THE COURT: -- and then he not --

9 MR. ACKMAN: You certainly can. The general rule
10 is you should have a hearing first. OATH should know this,
11 of all people, and the Court --

12 THE COURT: But that does not exist, right?

13 Would you agree with me that it is not OATH's
14 normal practice to give hearings to pre-suspension in all
15 different contexts?

16 MR. ACKMAN: Yes, it is.

17 THE COURT: What about the TLC drivers, they lose
18 their licenses on --

19 MR. ACKMAN: No, correct. That -- that's the one
20 instance where -- and that's allowed because there's an
21 arrest. But in general cases --

22 THE COURT: Or drug test, positive drug test.

23 MR. ACKMAN: Yes, true.

24 But I want to -- and *Rothenberg* had to do with the
25 final termination. There was nothing in *Rothenberg* about

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1 the pre-depravation hearing or the lack thereof. *Rothenberg*
2 had to do with postconviction hearing with postconviction
3 penalties without --

4 THE COURT: Understood. I understand there is no
5 risk of -- there is less of a risk of error.

6 MR. ACKMAN: Much, much, much, much.

7 Certainly, but as to whether what OATH does
8 normally, yes, taxi drivers are suspended all the time for
9 things that they do, but only after they're convicted of
10 something they do.

11 The one exception is the arrest and, yes, the drug
12 test. But there the drug test, as *Rothenberg* said, the
13 likelihood of error is much less because supposedly they
14 have this scientific test, and so that at least -- I mean,
15 we have a lot of problems where they do in *Rothenberg*. But
16 that's the premise of it, is that they have a scientific
17 test. They have a criminal charge by a police officer
18 that's been filed in court. You don't have any of that
19 here.

20 And the reason I talk about three charges is
21 because three of them were just self-evidently false. The
22 other three are based on testimony by drivers, not recent
23 cases, but mostly a few years ago. So it's not like this is
24 something pressing. There's no -- in order to violate the
25 general rule that there should be a hearing prior to a

1 depravation, there has to be some pressing reason.

2 Now, in *Nnebe* they found it was pressing because
3 the guy stood accused of a criminal act. We have no
4 criminal act here. As to the three charges that are based
5 on affidavits, we have, I would say at worst, neglectful
6 behavior. I don't think there's anything wrong with
7 Mr. Raja's behavior in any event, and his explanations, I
8 think, are perfectly reasonable and -- and -- and accurate,
9 what -- he did nothing wrong in those cases. But even if he
10 did do something wrong, there's no pressing danger to the
11 quote/unquote vulnerable population. No one in this
12 vulnerable population is pressing for Mr. Raja's license to
13 suspended. Just the opposite, if they were here, I think
14 they would say, do not suspend him. Let him work. If the
15 charges against him prove true, then suspend him or do what
16 you will. But there is no pressing need to suspend him now,
17 Judge.

18 THE COURT: Why not, though? I mean, this system
19 relies on the integrity of these registered representatives
20 and there are allegations that he committed falsehoods,
21 which you dispute. But nonetheless, the TLC and OATH have
22 an interest in protecting the individuals who will appear
23 before them, based on violations of City law, and who will
24 pay Mr. Raja in the interim to represent them. So it seems
25 to me that the Government or the City has adequately

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1 justified its pre -- or, I'm sorry, it's lack of hearing for
2 suspension or pre-suspension lack of hearing in --

3 MR. ACKMAN: Your Honor --

4 THE COURT: -- as it has in other cases. And I
5 also want to say that I am not sure the case law stands for
6 the proposition that in our particular case because the
7 allegations are weaker than in some, that I could say that
8 OATH is required to give Mr. Raja -- compared to everybody
9 else who falls under the same structure or process a
10 pre-suspension hearing.

11 MR. ACKMAN: There is no everybody else, Judge.
12 They haven't cited any other cases where they've done this.
13 As far as I know this is a unique practice.

14 THE COURT: Again, when you say unique, unique to
15 Mr. Raja or unique to registered representatives?

16 MR. ACKMAN: I'm not aware of any other instance
17 where a registered representative was summarily suspended.
18 And the weakness of the charges speak to the second *Matthews*
19 factor, but I submit you don't even get to the *Matthews*
20 factor until you have some pressing need demonstrated to
21 violate the general rule which is you have a hearing first,
22 then a suspension. Even if it's a very brief hearing, an
23 interview of some kind, you should have some kind of check
24 on the veracity of the charges and then you proceed.

25 But then there is other problems. I mean, you

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1 said you don't know if he's going to get a hearing. There's
2 no -- I mean, if he was going to get a hearing, presumably
3 they would have said it. They said respond in writing, then
4 we'll discuss -- or they didn't schedule a hearing.

5 THE COURT: But why should we get involved before
6 that actually gets determined? In other words --

7 MR. ACKMAN: Well, because it's already been
8 determined.

9 THE COURT: Well, no. I mean, I do not know if
10 there is going to be a hearing and you do not know if there
11 is going to be a hearing. So the question is why should you
12 not have to wait until after you are denied the hearing and
13 some final determination is made to say, We were denied due
14 process?

15 MR. ACKMAN: Well, if there's going to be a
16 hearing here, I'm sure my friend will say so. So far, it's
17 a letter, doesn't indicate there's a hearing. Ms. Stitelman
18 has not indicated there's a hearing.

19 And they didn't just get the papers this morning,
20 by the way. I sent them the papers yesterday so they would
21 have a heads-up. I spoke to him earlier -- not to
22 Ms. Stitelman. She was just assigned later. But the author
23 of the email suspending Mr. Raja, I spoke to him yesterday.
24 I sent him the papers, I think around 6:00 o'clock last
25 night. So they had a -- they could have come in here an

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1 said, No, we're giving him a hearing. He's made a mistake.
2 But they're not saying there's a mistake. There's no
3 hearing scheduled. There's nothing in the charging letter
4 or the email about a hearing or the process of the hearing.
5 There's only prospect of a paper record, and that itself is
6 a constitutional violation based on the failure to allow him
7 cross-examination.

8 Now, certainly you can say it hasn't happened yet,
9 but you can enjoin their suspending him without giving him a
10 proper hearing, which would include testimony and
11 cross-examination. That's in their own rules.

12 THE COURT: Well, let me ask Ms. Stitelman this:
13 Would you agree, Ms. Stitelman, that if OATH or TLC, I do
14 not know who exactly would be the operating agency,
15 determined that Mr. Raja should lose his privileges as a
16 registered representative without a hearing after he
17 responds in writing, would you agree that that might be a
18 due-process violation?

19 MS. STITELMAN: I would not. Once the final
20 determination is made, then there is an opportunity to bring
21 an Article 78 in state court to see if there was an error of
22 law. That is exactly what an Article 78 is designed for and
23 it is part of that process for the plaintiff here.

24 THE COURT: Is it correct that it is not the
25 normal course for registered representatives to be summarily

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1 suspended without a hearing, that Mr. Raja in that regard is
2 unique?

3 MS. STITELMAN: No, not at all. In fact, this is
4 completely in line with both Rule 65RPN -- or 48RPNY6-25D.

5 THE COURT: Well, hang on a second.

6 MS. STITELMAN: Sure.

7 THE COURT: 65 --

8 MS. STITELMAN: 48RPNY.

9 THE COURT: Okay.

10 MS. STITELMAN: 6-25D.

11 THE COURT: All right. And what does that say,
12 very slowly?

13 MS. STITELMAN: Sure. Do you want me to read it
14 or summarize it?

15 THE COURT: Sure, whichever.

16 MS. STITELMAN: Okay.

17 THE COURT: I mean, but I do not know how long.
18 Just go slowly.

19 MS. STITELMAN: Okay.

20 So D1 states that, Notwithstanding the provisions
21 of Subdivision C above -- of this section, the chief
22 administrative law judge may summarily suspend or bar a
23 representative upon a determination that the representative
24 lacks honesty and integrity, and that the lack of honesty
25 and integrity will adversely affect his or her practice

1 before the tribunal.

2 Item Number 2 goes on to say that, Any action
3 pursuant to this subdivision be on notice to the
4 representative. After the summary suspension or bar, the
5 representative will be given an opportunity to be heard in a
6 proceeding prescribed by the chief administrative law judge
7 or his or her designee. Factors to be considered in
8 determining whether a representative lacks honesty and
9 integrity include, but are not limited to, considering
10 whether the representative has made false, misleading, or
11 inappropriate statements to parties or tribunal staff.

12 And then finally the next section, which is E,
13 states that, The decision of the chief administrative law
14 judge or his or her designee under C or D of this section
15 constitutes a final determination, and judicial review of
16 the decision may be sought pursuant to Article 78 of the
17 New York City Civil -- New York Civil Practice Law and Rule.

18 THE COURT: Okay.

19 MS. STITELMAN: So this provision is designed to
20 provide the process that Plaintiff here claims that he's not
21 getting.

22 THE COURT: All right. I guess that is what
23 troubles me most, Mr. Ackman, is that there is a process,
24 and your claim is that that process, which has been set
25 forth in those regulations and on its face, applies to any

1 registered representative, not just to Mr. Raja, that that
2 entire structure does not satisfy due process.

3 MR. ACKMAN: Judge, we never denied that there's a
4 rule. We cite the rule in our papers. I think we quote the
5 rule. I can't find where it's quoted, but we're
6 certainly -- and we certainly have a copy of it as an
7 exhibit. So we're not denying that there's a rule that says
8 they could do it, but that doesn't make it constitutional.

9 Now, what I did say, and Ms. Stitelman didn't
10 contradict, is that I was not aware of this actually
11 happening to any registered representative. So it's not
12 something they routinely do, even though there's a rule that
13 apparently allows them to do it, assuming the rule's
14 constitutional, which it's not.

15 THE COURT: But you are challenging, then, this
16 entire rule.

17 MR. ACKMAN: No, I'm not. I'm challenging it as
18 applied.

19 THE COURT: And the basis, though, for your
20 as-applied challenge is that the second element, namely, the
21 potential for error in Mr. Raja's case is more dire or
22 severe or demonstrable than anyone else?

23 MR. ACKMAN: That's one basis -- well, I don't
24 know about anyone else because, like I said, I'm not aware
25 of any other case. Certainly there's no reported case. I

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1 looked to find a reported case. I found none.

2 THE COURT: Okay.

3 MR. ACKMAN: Now, I'm not -- I am saying that
4 there's a -- well, there's a possibility of error because
5 three of the charges immediately on their face are bogus.
6 So that leaves the other three which I think are equally
7 bogus, but not immediately apparent. But it is apparent in
8 this sense that the rule that Counsel just cited doesn't
9 just say they did something wrong, it says that affects
10 their ability to practice before the tribunal.

11 Now, there's no allegation here that Mr. Raja even
12 if he screwed up an appeal two or three years ago is
13 incompetent for that reason or unable to proceed. Really
14 he's done 20,000 cases in this tribunal. There's complaints
15 on three of them, and they're not even about the cases.
16 They're like to identify himself as a lawyer? His business
17 card says he's not a lawyer. So that guy probably just made
18 a mistake. He thought he was a lawyer because he was
19 wearing a suit and he was talking to drivers about their
20 legal issues which, of course, he's supposed to be doing.
21 So the charges here are flimsy at best, and that increases
22 the likelihood of error. But like I said, you don't get
23 there because you have the general rule, which this Court
24 should apply, unless there's some reason not to and there's
25 no reason not to.

1 There's no suggestion here that there's something
2 dire or pressing that I need to suspend him now as opposed
3 to on March 22nd or on March 30th or on May 22nd after they
4 decide what they're going to decide. And there is no -- and
5 we have not heard any statement that there's going to be a
6 hearing. There's no reason to think there's going to be a
7 hearing. If there is a hearing, great, we'll appear at the
8 hearing. But if there's not, this Court should say he
9 cannot be suspended without a hearing. There's nothing
10 wrong with that.

11 And Article 78, finally, is not a defense. I
12 mean, I know there's *Locurto*, that's kind of a rogue case.
13 The Supreme Court has said in many context and many times
14 when there is a general and routine -- a practice and this
15 is a practice that's codified in a rule, that you do not
16 need -- you do not need to exhaust administrative remedies
17 before going to federal court. Rather you can immediately
18 go to federal court to make sure you're not subject to
19 unconstitutional practices. You might see in *Nnebe*, as
20 Your Honor cited, there's a mention of the Article 78
21 defense in that case and then it's totally ignored. So the
22 Article 78 defense appears from time to time in
23 Second Circuit cases. It's inconsistent with Supreme Court
24 precedent and with other Second Circuit cases.

25 If you look up like a case called *Rivera*, I think

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1 that's a Second Circuit case. I don't have the cite book in
2 front of me, but I can try and get it on my computer if you
3 would like, that says Article 78 is not a defense to a
4 deliberate practice.

5 THE COURT: But we are not talking about a
6 defense. And I am going to point you to the language in
7 Judge Cote's judicial provisional technique, which I think
8 is quite insightful on this point, and that is the *Schneider*
9 decision. And in it she said, As for the second factor, the
10 risk of erroneous deprivation and the probable value of
11 additional procedures, which is the third factor, Courts
12 consider both the significance of the pre-imposed
13 deprivation process. And she cites the case of, a Supreme
14 Court case of *Cleveland Board of Education versus*
15 *Loudermill*, L-O-U-D-E-R-M-I-L-L, 470 U.S. 532 at 547,
16 Note 12. It's a case from 1985. And then she goes on to
17 say, In the somewhat analogous situation where a tenured
18 public employee is discharged, the Second Circuit has held
19 that due process did not require a pre-termination hearing
20 before a neutral adjudicator because an Article 78
21 proceeding constitutes a wholly adequate post-deprivation
22 hearing for due-process purposes. And then it cites
23 *Locurto*, which is a case you are saying is on an outlier or
24 a rogue case, and this is from a 2018 decision by Judge
25 Cote.

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1 Now, obviously, I recognize it is not the Circuit,
2 but I think her reasoning makes sense, which is what I had
3 said to you earlier, the risk of erroneous depravation is to
4 a large extent mitigated by the fact that he has a
5 pre-depravation process. Maybe not pre-suspension process,
6 but he certainly has pre-final depravation process and that
7 will happen in two weeks. If he avails himself of that
8 process, he will be able to submit some rebuttal to these
9 claims which you say are wholly unfounded and for which you
10 say you have hard proof that they are untrue, whether it is
11 the registration accusation or the statement that he
12 misrepresented himself with a card as a lawyer.

13 Again, I do not think it is appropriate and I do
14 not adopt your argument that I should consider the factors
15 in a vacuum, namely, what is the risk of erroneous
16 depravation as to Mr. Raja just in his case as opposed to
17 what is the process that is being followed by the City in
18 terms of suspension and then final determination of
19 depravation -- I'm sorry, of termination. And that is why I
20 think Judge Cote is exactly right, that if this process were
21 endless if, for example, or there were no process by which
22 he could appeal the finding or determination of the ALJ in
23 the first instance, I would agree with you, that not just as
24 to Mr. Raja's case but any of the cases brought under the
25 same regime, there could be a due-process violation and it

1 would be appropriate for him to take some action to stop
2 that. But here we are talking a clearly defined process
3 that is in the regulation, that is being followed, that he
4 can avail himself of as soon as by March 22nd to oppose the
5 action that is being taken and to refute the claims against
6 him.

7 MR. ACKMAN: Judge, just because there's a clear
8 defined process in the regulation means nothing
9 constitutionally. In the *Harrell* case as we cite in our
10 papers, the TLC thousands of times a year were seizing cars.
11 Judge -- I'm forgetting her name -- I forget the name of the
12 judge, but I shouldn't because it was also my case. She
13 said all thousands of these as many times as they do it, not
14 only was it in a TLC rule, it was actually in a City statute
15 and she said that statute as applied here is
16 unconstitutional. And so the fact that there's a regulation
17 that is supposedly being followed, which we don't know if
18 it's being followed in any consistent way because there's no
19 reported cases and we haven't heard of any other cases, even
20 though Ms. Stitelman -- you haven't heard of any other
21 cases, we don't know of any other cases, Ms Stitelman
22 doesn't know any, I don't know any, I don't know if Mr. Raja
23 knows any where they're suspended without a hearing, so we
24 don't know what they're doing normally. All we know is what
25 they're doing in this case and that is rife with error

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1 because they're charging him with not registering when he
2 plainly did register.

3 THE COURT: But, again, why is it not enough that
4 he gets to make the exact same argument you are making to me
5 to OATH?

6 MR. ACKMAN: Because he's going to be suspended
7 for two weeks before he gets to make any argument.

8 Why -- I think there's -- the shoe is really on
9 the other foot. OATH should have to justify doing something
10 which is violently against the constitutional norm that
11 people that get hearings before they're punished, not after.
12 And it should be -- the -- the burden should be on OATH to
13 say, What fact do we cite here? Can we cite here? Have we
14 ever cited here that says Raja is practicing in a court
15 where he's practiced every day for 14 years and doing
16 thousands upon thousands of cases with nary a peep of any --
17 with no issues of his behavior in any of those cases until a
18 few days ago, what is so pressing that they need to suspend
19 him without a hearing? There's nothing. They don't cite
20 anything. There is nothing. There's nothing they could
21 cite. It's just really bizarre behavior on their part.
22 Just because they have a rule that says they can do it, (A),
23 doesn't mean they can do it because the rule could be
24 unconstitutional as applied, and, (B), doesn't mean they
25 should do it.

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1 I mean, it's just -- it seems like they've just
2 gone crazy here for some reason that they want to make some
3 kind of example of Mr. Raja citing cases that didn't occur
4 last week, last month, this week, this year. Citing cases
5 that were heard in 2016 and 2017, I think early 2018 in one
6 case, but he did nothing. And some of these affidavits are
7 dated years ago. I don't know when they were actually
8 signed or how they came to anybody's attention, but they
9 certainly did nothing when it happened, assuming they got
10 notice of it. And they certainly did nothing in 2016 when
11 he didn't -- quote/unquote, didn't register. Of course, he
12 did register. They didn't do anything -- if he didn't
13 register, they should have said, Why aren't you registered?
14 That's what they've done other times. They've lost the
15 registration forms. It's just an almost insane act and an
16 unconstitutional act, as well, which is the point here for
17 them to suspend him without taking any -- taking five
18 minutes to ask, Mr. Raja, look. We have this affidavit.
19 What do you have to say about it? Why can't they do that?
20 No reason.

21 THE COURT: Yes, I think I made myself clear,
22 Mr. Ackman. My problem now is not about the merits of what
23 he is going to argue as to why OATH is wrong or TLC is
24 wrong, but it is your claim of a due-process violation. I
25 know that you are now saying it is an as-applied challenge,

1 but again, even looking at his particular factors, which I
2 am not sure is appropriate, I cannot find that he is going
3 to be irreparably harmed by having to wait two weeks to make
4 his case and because there is actually a process. I do not
5 weigh those *Matthews* factors the same way you do.

6 Yes, the first factor, pursuing a livelihood, is
7 certainly important. But again, that issue comes up in
8 terms of irreparable harm. It is unfortunate that he is
9 going to lose his salary for two weeks, but that is not
10 necessarily something that cannot be compensated for down
11 the road if, in fact, it is determined that they improperly
12 suspended him and he continues in this lawsuit and you are
13 able to convince, for example, the Court that this is a
14 due-process violation, which I have my doubts about. And if
15 in every case of someone losing their pay for some period of
16 time or even permanently in some cases were enough, then
17 obviously every case involving some termination from work or
18 loss of income would end up being irreparable harm. And
19 that is a factor, obviously, outside of just analyzing the
20 due-process claim. You are seeking a TR0, which is an
21 extraordinary remedy. You are asking me to undo a City
22 process or City finding which leads in two weeks to more
23 process for Mr. Raja. I am not stopping that process, but I
24 am certainly stopping the City from doing what it thinks is
25 appropriate at this time pending review in another 14 days

1 or so. That is extraordinary, and I think you are skipping
2 over that fact.

3 I also do not agree with you that my weighing of
4 the *Matthews* factor at the second stage should be so
5 specific to what you say are the merits of his claim in
6 terms of the erroneousness of the depravation. I think as
7 has happened in many cases you make a fair argument that the
8 process that they use, which does not involve a hearing,
9 does not require testing of the scientific sort in drug
10 testing or a conviction where there is a whole criminal
11 process that ensures the reliability to some extent on the
12 result, or at least provides greater support for that, that
13 I agree with you makes the TLC's determination for
14 suspension, summary suspension, certainly more vulnerable on
15 the second factor, the risk of erroneous depravation. I do
16 not think that that weighs for the City in any way. But I
17 do not think it substantially weighs for the plaintiff
18 because you argue the specific. I would say the process in
19 general, which is what I am looking at, does not necessarily
20 mean that this is going to be a higher risk of erroneous
21 depravation.

22 In this instance, they have cited six different
23 reasons or bases, it is not just a single incident. You
24 dispute them. At least three of them I think are subject to
25 dispute or debate that involves at least two people claiming

1 something happened or did not happen as between your client
2 and some other people. So I do not think the process itself
3 is so fraught with a potential for erroneous depravation,
4 and as I have said before and I do not mean to beat a dead
5 horse, I do think just as Judge Cote found in *Schneider*, the
6 consideration of what the risk is has to be tempered in some
7 ways or viewed in the context of what pre- and
8 post-depravation processes exist. And here while there may
9 not be a pre-suspension process, there certainly is a
10 post-suspension process, certainly a chance for Mr. Raja to
11 respond and then if he disputes the ultimate ruling in an
12 Article 78 proceeding and if he is ultimately permanently or
13 finally terminated as a registered representative.

14 MR. ACKMAN: Your Honor, may I just respond to a
15 few points?

16 THE COURT: Yes.

17 MR. ACKMAN: You keep saying, Your Honor, two
18 weeks. But there's no two weeks limit here. The Judge says
19 if he doesn't get a response, he will rule on March 22nd.
20 That doesn't mean he's going to rule on March 22nd if he
21 does get a response. The summary suspension could go on --
22 well, we don't know how long.

23 THE COURT: Agreed.

24 MR. ACKMAN: So it's not two weeks.

25 Secondly, the reason I'm arguing a particular fact

1 is because that's the only thing we have. If I had a whole
2 series of cases where they consistently got it wrong, or if
3 I have a whole series of cases where they consistently got
4 it right and that they suspended the guy and then determined
5 they were right to suspend him after having a hearing; or on
6 the other hand, if they suspended a guy and then determined
7 they were wrong to suspend him, we don't have other cases.
8 We only have one instance. So that weakens the argument, I
9 grant, as to the likelihood of error. What I do say is that
10 the charges here are so weak that the likelihood of error in
11 this particular case is quite high.

12 I don't know what the facts are of the *Schneider*
13 case. I'm not familiar with that case, so I can't really
14 argue anything about it. I would like to be able to read
15 that case and may send a letter in.

16 But I would like to say another case, a 2018 case
17 in this court in this building, *El Boutary*, where they said
18 it was a constitutional violation, which is spelled E-L,
19 second word B-O-U-T-A-R-Y. They said it was a
20 constitutional violation to suspend him, even though they
21 had testimony from passengers. They had a video, because
22 all of that could be challenged and it would properly be
23 challenged before he was suspended. Now, we didn't -- in
24 that case we did not seek a TRO, but the Court ruled that
25 there was a constitutional violation, and then the case was

1 soon settled after that. That settlement is public record.
2 So I think -- actually, it's not public -- I'm not sure if
3 it's a public record yet. The fact of the settlement is, I
4 don't know if the -- what the terms of the actual settlement
5 are. But there's a huge likelihood of error. They're going
6 against the general rule. They have no reason to go against
7 the general rule. And then you say he gets a hearing after,
8 but the hearing he's going to get after is constitutionally
9 defective as well in that he's not going to get the right to
10 cross-examine the witnesses against him. So the hearing
11 that they are proposing as a remedy to the summary of
12 suspension is itself unconstitutional.

13 THE COURT: But, again, all of this is premature.
14 I mean, you are asking me to speculate about what process he
15 is going to get after this. And all I am saying is you have
16 to acknowledge is you do not know what is going to happen
17 next and I do not know. But you cannot have me say that
18 before we even know the full measure of the process he is
19 going to get, that it is somehow defective.

20 I understand that you feel very strongly and will
21 obviously advocate very strongly to OATH that the charges
22 brought against Mr. Raja are flimsy and unsupportable. That
23 makes perfect sense and that strikes me as the way the
24 process ought to work. There is a process and I also want
25 to note that the *El Boutary* case that you just cited does

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1 say, In determining what process is due, accounts must be
2 taken of the length and finality of the depravation.

3 Here you have a suspension that will last some
4 period of time that has yet to be determined and has yet to
5 take effect. But at a minimum of what I do know is that
6 within two weeks, he will be permitted to submit his
7 rebuttal and thereafter there may or may not be a hearing.
8 At that point if he is denied a hearing or if the length of
9 his depravation goes on beyond two weeks, you would have a
10 stronger argument. But these things, it seems to me based
11 on all the case law, seem to operate on some sort of
12 continuum. It is not simply that because he did not get a
13 hearing before, he was deprived in this case of his pay for
14 the next two weeks or his source of income for the next two
15 weeks, it's a due-process violation. And right now I think
16 it is, at minimum, premature to say that there has been a
17 depravation at all of his due-process rights. Or that there
18 has been a violation simply because he said the charges are
19 flimsy.

20 MR. ACKMAN: But, Judge, as to the prematurity, I
21 don't see how you could even suggest that, Your Honor, with
22 all due respect. First of all, they say it's going to take
23 effect on March 8th. That's tomorrow. I think that if we
24 take them at their word, they don't say might take effect.
25 They say it will take effect. That's tomorrow. It's not

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1 premature.

2 Secondly --

3 THE COURT: No. As far as it is premature, I was
4 referring to whether or not he is going to get due process
5 here --

6 MR. ACKMAN: There's no question --

7 THE COURT: -- the plaintiff has a due-process
8 violation.

9 MR. ACKMAN: Well, I mean, all you need to do is
10 look at their own words. Hence, the reading of the
11 suspension letter, If you wish to refute these findings of
12 misconduct, you must submit to me no later than March 22nd a
13 written response or you may attach any evidence. Then it
14 says, Your written response and submitted evidence will be
15 considered before a final determination is rendered.

16 To me that is very clear, they have no plan to
17 have a hearing. They have no plan to allow
18 cross-examination. If they planned to do that, they would
19 have scheduled a hearing for March 22nd or whenever. They
20 would have scheduled a hearing if they wanted to have a
21 hearing. They do that every day. They know how it's done,
22 Judge.

23 THE COURT: If they do not schedule a hearing and
24 they terminate him, then you can come back here and make an
25 argument about the final depravation.

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1 MR. ACKMAN: But it's relevant right now because
2 you said we don't know what's going to happen, but we do
3 know what's going to happen in that they're not going to
4 have a hearing. I mean, they say they're not.

5 THE COURT: They do not say they are not. They do
6 not say anything. They just say submit something in writing
7 to us by X date.

8 MR. ACKMAN: Your written response and submitted
9 evidence will be considered. I mean, they don't say, We're
10 not having a hearing, but if they wanted to have a hearing
11 as they've claimed to have a hearing, they would have said
12 so. They would have told their counsel, and she would have
13 said so.

14 THE COURT: No. But I mean, they do not have to
15 set a hearing because he might not submit anything, or they
16 may consider what he submits not worth having a hearing
17 over. So, yes, there is no guarantee he is going to have a
18 hearing, but there is no guarantee he will not. And that is
19 what you want me to assume. Again, we are talking about a
20 process. I am not convinced, and I know that the
21 centerpiece of your argument is that it is a due-process
22 violation simply not to have a hearing before he gets
23 suspended. I do not agree with that based on the balance
24 within the *Matthews* factors.

25 I see that, of course, Judge Ross held it in

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1 *El Boutary* that, as you say, it is a more extreme situation
2 where you do not have some kind of hearing pre-deprivation,
3 but bear in mind the context of that case was long after
4 some kind of suspension that was, in theory, temporary or
5 before more process was given. That case, because of the
6 posture of it, involved a situation where the plaintiff
7 already was, you know, finally deprived of their property
8 interest.

9 MR. ACKMAN: That's not right, no. In that case
10 he was suspended without a hearing. By the time Judge Ross
11 decided that case, the suspension was over. But she -- what
12 she said was he was entitled to a remedy for the fact there
13 was an unconstitutional suspension. She knew it -- in that
14 case, she knew everything that was going to happen because
15 it had already happened.

16 THE COURT: And what was the remedy?

17 MR. ACKMAN: We got damages.

18 THE COURT: Okay. Why does that make --

19 MR. ACKMAN: But again --

20 THE COURT: -- it not irreparable -- well, but
21 again --

22 MR. ACKMAN: Because -- because the case is a
23 precedent for saying it's unconstitutional to deprive him of
24 a hearing.

25 THE COURT: But let me address the posture then.

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1 You have to show me irreparable harm. If he can
2 be compensated for, as I mentioned earlier, any lost
3 wages --

4 MR. ACKMAN: Right.

5 THE COURT: -- how can you show irreparable harm?

6 MR. ACKMAN: Well, that -- that -- okay. That --
7 I wanted to make clear, that is a separate question and a
8 fair question, but it doesn't make it -- id doesn't say that
9 there's no constitutional violation. But the irreparable
10 harm -- and the Court, the Second Circuit has stated that
11 when there's a constitutional violation, irreparable harm,
12 you don't need to find further irreparable harm. But if you
13 did, we have it because not only is he losing his income,
14 he's losing his client relationships, his clients will
15 suffer.

16 THE COURT: Why? They can find someone else --

17 MR. ACKMAN: He's -- he's --

18 THE COURT: -- to represent them.

19 MR. ACKMAN: They've already posted his name on a
20 list of suspended representatives even before today.

21 THE COURT: And if it is undone, he will be
22 removed from that list.

23 MR. ACKMAN: He will be removed from that list,
24 but meanwhile, people will see he is a suspended guy. He is
25 suspect in some way. The Court doesn't like him. He --

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1 he -- his client relationships will suffer. His business
2 will end. He cannot do this job somewhere else. This is
3 the only place you could do this job.

4 THE COURT: There is no question that during the
5 time he is suspended he will not be able to do this, but I
6 do not think you have shown that he can't restart his
7 business if he actually is not permanently barred from
8 the registration; and nor is this the type of business where
9 somehow there is a lasting effect of temporarily being on
10 the list. His client base, I presume, is ever changing.
11 There are more and more taxi drivers who might need his
12 assistance. He has represented 20,000 people, you say
13 successfully. I just do not accept the notion that somehow
14 this will be the end of his business. And it is not a
15 compensable harm just as happened in *El Boutary*, so the
16 period that he has been wrongly suspended, he will be
17 compensated should he prevail.

18 MR. ACKMAN: I'm not so sure you can say that,
19 Judge. If you have -- because the City will certainly say,
20 We don't know what he would have made during that time. He
21 didn't have a right to make it, because he wasn't working.

22 THE COURT: But that is a calculated difference
23 than his ability to collect it. Just as you said in
24 *El Boutary*, the Judge decided that he was entitled to
25 damages. I presume he got some measure of damages that the

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1 Judge was able to figure out. I actually think it would be
2 quite easy in this situation because you tell me that he has
3 got meticulous records and he has represented 20,000 people,
4 I am sure he had some idea of his yearly salary or even
5 monthly salary. So that does not strike me as a strong
6 argument.

7 Again, these are a little premature albeit
8 somewhat of an elusive description, but when it comes to
9 irreparable harm, I think it is also applicable. He
10 undoubtedly, and I am not minimizing the difficulty it will
11 present to him and his family in terms of making money, but
12 that is certainly true of anyone who loses their job or
13 their employment for a period of time but can get
14 compensated later, because by being reinstated, which
15 hopefully will help if you prevail, or by getting
16 compensated for any wrongful --

17 MR. ACKMAN: If it's a normal job -- he -- he's
18 called a salary -- he doesn't get a salary. He gets fees
19 from clients.

20 THE COURT: That are documented. I mean, he
21 certainly can tell you how much he made --

22 MR. ACKMAN: He can tell you --

23 THE COURT: -- in a given year.

24 MR. ACKMAN: He can tell me how much he made in
25 a -- in a -- in the previous two weeks. Yes, certainly he

1 can do that.

2 But what he cannot do is go back to the people who
3 are not -- if you have a salaried job and you lose your job
4 for two weeks, presuming the person paying your salary pays
5 you back pay. There is no back pay here. And that is
6 another factor which --

7 THE COURT: Well, he is not going to get it from
8 those people. He is going to get it from the defendant if
9 they lose.

10 MR. ACKMAN: Not all -- it's not --

11 THE COURT: The whole point is you prove
12 a due-process violation such as found in *El Boutary*, there
13 is a remedy. He gets compensated for the lost wages or
14 earnings he would have made had they not wrongly terminated
15 him or suspended him, right?

16 MR. ACKMAN: Right. But he doesn't -- there's no
17 way to value the loss to his reputation for being on this
18 list, and he will continue on the list for at least two
19 weeks. Word will get -- it's a small community, Judge.
20 Word gets out. People hear about it. And he shouldn't be
21 on this list before he's had a hearing.

22 THE COURT: In that regard I think you do not have
23 a strong argument. This is not a business, an ongoing
24 concern where there is some loss of clientele that will be
25 permanent. His is actually a much more fluid business. It

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1 is incidental that when people all of a sudden have a need
2 to go in front of OATH, they may call him. Once he is off
3 the list, it does not strike me that he is going to be
4 injured in any way in terms of finding new people who never
5 saw the list before, never had a reason to look at the list
6 before. There is a never-ending stream of people he
7 represents. I am sure that is true based on his own
8 experience.

9 MR. ACKMAN: That is true, Judge. But people will
10 go to the court and see he's not there and will wonder and
11 they'll say, Why aren't you there? And he's says, I was
12 suspended. Why were you suspended? Because they accused me
13 of dishonesty. They didn't give me a hearing. I assure
14 you, I was not dishonest. I mean, the whole idea of these
15 appropriations, that charge is kind of a joke. You know,
16 these people paid him money willingly. He didn't
17 appropriate their money.

18 THE COURT: I know. You keep going back to the
19 merits, but I am just talking about whether there is going
20 to be such damage to --

21 MR. ACKMAN: You're right. I'll stick to that
22 point. But the Court of the Second Circuit have said that
23 when there's a constitutional violation, that's enough for
24 irreparable harm. And I'm giving you, the Court, other
25 reasons to find irreparable harm beyond that. I don't think

1 you need to go beyond that, just like I don't think you need
2 to go beyond the general rule. But there's reasons that
3 harm is -- irreparable harm doesn't mean you can't, like,
4 ever compensate for it. It means it's hard to value, and
5 the value to his reputation for being on the list, from not
6 being in court for this period of time, which we don't know
7 how long it will be, for being branded a cheat by OATH
8 without a hearing, all of this is ongoing and difficult to
9 value reputational harm and financial harm, that is hard to
10 evaluate and that's why we stop it before it happens.
11 That's what the whole idea of a preliminary injunction is
12 about. That's why we have TROs. That's why it's a possible
13 remedy, because anything presumably can -- many things can
14 be compensated later, but certain things you want to stop
15 before they happen if you can. And you should do it now
16 because you can, Your Honor, and it's in your jurisdiction.
17 It's within the law. There's no reason not to because he
18 presents no threat to anybody.

19 The only threat here is the threat to Mr. Raja and
20 his clients because he's unjustly deprived of his livelihood
21 without reason, without hearing, without even being
22 interviewed. That's just not due process, and he's never
23 going to get due process because he's going to get a hearing
24 before a judge who is also the prosecutor. Where do they
25 get that? He's going to get a hearing. He's not going to

1 get a hearing at all where we can question the witnesses.
2 They're doing something unconstitutional and defending it by
3 another unconstitutional act that they're going to give him
4 post-deprivation relief potentially, but they're never going
5 to give him a fair hearing. They've said it. You should
6 trust them. Take them at their word.

7 THE COURT: All right.

8 Did you want to respond, Ms. Stitelman?

9 MS. STITELMAN: I have nothing specific further
10 unless you have a question.

11 THE COURT: All right. Well, let me do say this:
12 I mean, with respect to the TRO standard, which is very
13 similar, of course, to a preliminary injunction standard, in
14 theory a plaintiff could establish a basis for injunctive
15 relief or immediate relief shown if there's a serious
16 question as to the merits of his claim. And I guess the
17 question for you is whether or not there is a serious
18 question. Because I think Mr. Ackman, notwithstanding the
19 fact that I have been spending most of my time disagreeing
20 with him or even arguing against his point, certainly does
21 point out what has been found to be a somewhat overly
22 summary process when it comes to the TLC, and obviously
23 *El Boutary* stands for that, to some extent, because there
24 seems to be this rule that allows for the summary suspension
25 or termination of individuals who come within the purview of

1 the commission. And I understand that the rationale, and
2 *El Boutary* also notes that, is that that kind of process can
3 be suspended where the Government has a significant interest
4 in -- or enough of an interest that it justifies taking
5 these extraordinary measures of denying people rudimentary
6 process before suspending them. And certainly with respect
7 to drivers, that makes a lot of sense because they're out on
8 the street, the potential for harm is immediate and
9 recognizable.

10 With respect to Mr. Raja's representation of
11 people before an adjudicative body and given the nature of
12 what he has alleged to have done, it is just really a
13 situation where summary process is -- or at least is there
14 not a substantial question here that summary process as
15 applied here violates the due process in some way?

16 MS. STITELMAN: I think the allegations here
17 specifically with respect to misappropriation of funds,
18 impersonation of an attorney and verbal abuse are serious
19 accusations that affect the workings of the tribunal.
20 Again, this population is a vulnerable population. In one
21 of the affidavits supporting the misappropriation of funds,
22 it's taking money for a fee and then not doing what they
23 said they said -- he would do, not doing what he said he
24 would do. And that could have long-term consequences for
25 the people that he is representing.

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1 THE COURT: Okay.

2 MS. STITELMAN: And so to continue to have this
3 evidence that this is going on, that this --
4 misappropriation of funds saying, he's an attorney and
5 perhaps they rely on him in a different way, not returning
6 phone calls, acting in this way with this population who may
7 not have the savvy to know that this isn't appropriate,
8 really undermines the way OATH is supposed to work. It can
9 harm them going forward.

10 THE COURT: Well, I suspect Mr. -- thank you,
11 Ms. Stitelman. You can have a seat for a second.

12 I suspect, Mr. Ackman, if you liken Mr. Raja to an
13 attorney, you certainly would agree that the Court would
14 take it quite seriously if there were allegations of
15 misappropriation of funds related to a lawyer and possibly
16 suspend that person pending some further process.

17 MR. ACKMAN: It's an interesting analogy. It goes
18 exactly the other way. First of all, this is not -- the
19 word "misappropriation" is just used completely wrong. An
20 appropriation of funds is when you take it, even though
21 you're not -- you take it from someone without permission.
22 That's an appropriation. A misappropriation is taking it
23 from someone without permission and it's wrongful. He
24 didn't misappropriate anything. He was paid or fee for a
25 service -- or in two of the cases he was paid a fee for a

1 service. In one of the cases he wasn't paid at all. I
2 mean, that's his testimony. I think it's at least -- and
3 I'm certainly not arguing the merits. I'm just saying why
4 there's fair chance of error.

5 The other two cases he couldn't file the appeal
6 because they wouldn't -- he didn't have the tape, and then
7 he made good on it by giving the guy free services
8 following.

9 In the third case he paid the money back. So
10 there's no misappropriation of funds, and this whole
11 crocodile tears about the vulnerable population, I mean,
12 it's hard to take. Mr. Raja's presence in that court
13 protects that vulnerable population. They were trying to
14 get him out of there without a hearing. That's what hurts
15 the vulnerable population. They're not protecting anybody.
16 They're hurting Mr. Raja. They're hurting his clients
17 because they say one person three years ago who doesn't know
18 what a lawyer is, who doesn't know the difference between a
19 lawyer and a rep said he said he was a lawyer when he gave
20 him a business card that says he's not a lawyer. Please?

21 This is just -- to say that there's something that
22 Mr. Raja has done when three scattered complaints, which
23 they get out of nowhere to suspend him now immediately
24 without a hearing, that's not due process. That's not the
25 American style of justice.

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1 THE COURT: Let me ask you a question. If
2 Mr. Raja gets a hearing, contrary to what you think will
3 happen in a few weeks after he files his opposition and
4 nonetheless is terminated as a registered representative,
5 will you argue in this case that the process was still -- or
6 rather that he wasn't given due process and assume for a
7 moment that he can appeal that decision in Article 78?

8 MR. ACKMAN: If he's given a hearing where he's
9 allowed cross-examination, that will grant me some of the
10 wrongs. Everything they say in the letter, which I trust, I
11 take them at their word at this point, said he's not going
12 to get that kind of hearing. It says, Send us a letter.
13 Send us written submission. We'll decide. No sense of a
14 hearing. No promise.

15 Will Ms. Stitelman promise that we'll have a
16 hearing on March 22nd? If so, then that part of our case is
17 mooted, but she's not doing that, and they say they won't.

18 But the other thing is if the hearing is before
19 the judge who is also the prosecutor, that is as plain a day
20 a constitutional violation as you can imagine under both
21 New York Law and Supreme Court *Juris Prudence* from just
22 three years ago. So how can they possibly justify that? So
23 if they go through the process they say they're going
24 through, we certainly will be back here saying it's
25 unconstitutional. If they go through a process that's a

1 little bit better, maybe it will be a little better. But
2 the same man as the judge and the advocate? That's
3 unconstitutional, too.

4 THE COURT: All right. Well, let me say this: I
5 am obviously only addressing the request for temporary
6 restraining order, which as I mentioned before, has very
7 strict standards and should only be issued in extraordinary
8 circumstances. Obviously, this is ultimately
9 Judge Donnelley's case and she may view it differently
10 either sooner or later, depending on what happens after
11 today and whether or not there's any additional filings by
12 Plaintiff.

13 But I am bound to have to say I cannot issue this
14 TRO. And in fact, this conclusion, I think, is bolstered by
15 the very case that Mr. Ackman has pointed me to and is set
16 forth in their submission, and obviously I think it is my
17 conclusion after hearing the argument, and I think quite a
18 good argument from Ms. Ackman and also the argument of the
19 City as well, that this is just not a case where TRO is
20 appropriate at this stage of the process and considering
21 *Matthews'* factors overall.

22 So although I will be repeating myself to some
23 extent, let me point out that in *El Boutary*, the decision by
24 Judge Ross, I think she quite relevantly said, and I
25 mentioned this earlier, that in determining what process is

1 due, the Court should take a canvas on ranks and the
2 finality of the depravation, and this appears at Page 5 of
3 her opinion. And then she goes on to say and I think this
4 is really quite apt here, For if the suspended employee
5 receives a sufficiently prompt post-suspension hearing, the
6 lost income is relatively insubstantial.

7 So as much as you may resist, Mr. Ackman, the
8 notion that this is more of a continuum than a
9 black-and-white situation, I think *El Boutary* does reinforce
10 what I think I have been saying all along, which is that I
11 do have to view this along some sliding scale, if you will,
12 or in the broader context of what process is actually being
13 given. And without myself I think ruling on the merits of
14 the argument that you will be given an opportunity to make
15 to the adjudicative body below, namely, OATH and TLC.

16 And let me just say this: Then she goes on to
17 discuss the *Pavberg* case which is Judge Dearie's decision
18 that you have also relied upon and there as Judge Ross
19 recounts, Judge Dearie said that the taxi driver's private
20 interest was all the weightier in light of the duration of
21 the summary suspension.

22 So again, I think all of the precedent that has
23 being cited to me and the decisions of this Court in
24 particular reinforce the notion that there has to be some
25 consideration of what process is being given and how long

1 the suspension or depravation is. Right now it has not even
2 taken affect yet.

3 Mr. Ackman, you surmise that it could go on for
4 some length of time without a hearing. You may well be
5 right. But I think right now it would be premature to
6 disallow the City to engage in the process they think is
7 appropriate and summarily suspend him for the next 14 days,
8 at least while he prepares his response. But I fully
9 acknowledge that just as the decision made clear, there is
10 going to be a point in time at which the depravation and the
11 lack of a hearing or the property depravation/suspension and
12 the lack of a hearing will run afoul of the due process
13 requirement and then Mr. Ackman is free to come back here
14 and speak. I think at that point, the preliminary
15 injunction can end the suspension or somehow intervene in
16 that process. And certainly I will confer with
17 Judge Donnelly after today and give her my thoughts on that,
18 and obviously, she will have the benefit of this record.

19 So to reiterate, at this point I do not find based
20 on the facts of this case and the fact that the three
21 factors of the *Matthews* test show that the plaintiff at this
22 point in time can likely show that there is a constitutional
23 depravation or a constitutional violation, namely
24 due-process violation. While I think there is, of course, a
25 private interest at stake here, namely Mr. Raja's

1 livelihood, and I am not taking that lightly, the risks,
2 however, of erroneous depravation, I think is, as I told
3 you, not clear to me, though I think as time goes on there
4 is more concern about that because if there is no hearing,
5 as I mentioned before, I think that is the consideration,
6 Judge Cote's decision in terms of the risk of an erroneous
7 depravation. And at that point there will be both longer
8 suspension or greater depravation and also lack of process,
9 and therefore, a greater risk of error. So that after right
10 now I think is somewhat neutral.

11 But the last factor, the Government's interest, at
12 this point I think the Government does have the better of
13 the argument, that they have a systemic interest in trying
14 to police those individuals who represent parties before
15 OATH in TLC matters, and that while in this particular case
16 maybe the claims are wildly egregious, they certainly are
17 serious, namely taking money but not providing a service.
18 So I think that the Government does have an interest in some
19 summary process, but it cannot go on for long without the
20 plaintiff having a right to more process than he is getting
21 now, which is obviously only being able to write his
22 objection.

23 So that's how I weigh the factors, but I am bound
24 that I cannot say that I find a likelihood of success at
25 this point. But I fully acknowledge that the circumstances

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1 could evolve and change in a way that strengthens
2 Plaintiff's argument because, as I said, have said and I
3 think the case is made clear, all of these factors have to
4 be considered in combination and I think as time goes on and
5 if it goes on without Mr. Raja getting a hearing, then I
6 think it arguably becomes much more potent with respect to a
7 due-process violation.

8 So perhaps, Ms. Stitelman, it is something to take
9 back to your office and the related officers at OATH. To
10 the extent you have any sway over them, I suggest they pay
11 attention to this case because Mr. Ackman is obviously on
12 the warpath right now and is going to continue, I assume, to
13 pursue this case here with the ammunition that he has,
14 namely, some favorable case law in this district and in the
15 Circuit as well, and more particularly, in this court. But
16 the longer this goes on without some process, meaningful
17 process, the stronger his argument gets. All right?

18 MS. STITELMAN: Yes, Your Honor.

19 THE COURT: So if OATH does not want this Court
20 interfering with what it is doing, it perhaps should hear
21 Mr. Raja out sooner rather than later. All right?

22 MS. STITELMAN: I understand.

23 THE COURT: Okay.

24 MS. STITELMAN: Thank you, Your Honor.

25 THE COURT: Thank you both. Thank you,

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1 Mr. Ackman.

2 MR. ACKMAN: Thank you, Judge.

3 THE COURT: I certainly appreciate your argument
4 and your advocacy.

5 MS. STITELMAN: Thank you, Your Honor.

6 THE COURT: Thank you, again, to both of you.

7 (Matter concluded.)

8 --oo0oo--

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15 *I (we) certify that the foregoing is a correct transcript*
16 *from the record of proceedings in the above-entitled matter.*

17 /s/ David R. Roy
18 DAVID R. ROY

8th Day of March, 2019
Date